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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DEAN WESSELS,

Plaintiff,

v.

MOORE EXCAVATION INC., d.b.a. MEI
GROUP,

Defendant.

Case No. 3:14-cv-01329-HZ

**DEFENDANT MOORE EXCAVATION,
INC.'S ANSWER TO COMPLAINT AND
AFFIRMATIVE DEFENSES**

Jury Trial Demanded

MEI's ANSWER TO COMPLAINT

In Answer to the Complaint (Doc. 1), Defendant Moore Excavation Inc. ("MEI") admits, denies and alleges as follows:

1. Paragraphs 1 and 2 of the Complaint contain legal conclusions that do not require a response. To the extent a response is required, MEI denies such allegations.
2. Answering paragraphs 3, 4 and 5 of the Complaint, MEI admits that this Court has jurisdiction over this action and that venue is proper in this Court.
3. MEI is without knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 6 of the Complaint and, therefore, denies the same.
4. Admits the allegations of paragraph 7 of the Complaint.

DEFENDANT MOORE EXCAVATION, INC.'S ANSWER
TO COMPLAINT AND AFFIRMATIVE DEFENSES - 1

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5. MEI is without knowledge or information sufficient to form a belief about the truth of the conclusory and factually bare allegations in paragraph 8 of the Complaint and, therefore, denies the same.

6. Admits the allegations of paragraph 9. With respect to paragraph 10, Plaintiff admits that Plaintiff received a Notice of Right to File a Civil Suit from BOLI dated on or about June 4, 2014 indicating that BOLI did not find sufficient evidence to continue its investigation, but MEI is without knowledge or information sufficient to form a belief about the truth of the allegation regarding any "Notice of Private Right of Action" or "Notice of Right to Sue" from the EEOC and, therefore, denies such allegations. Except as specifically admitted herein, MEI denies the allegations of paragraphs 9 and 10 of the Complaint.

7. MEI admits that Plaintiff worked for MEI, but denies that Plaintiff always performed his job duties in a satisfactory manner. Except as specifically admitted herein, MEI denies the allegations of paragraph 11 of the Complaint.

8. MEI admits that it employed Plaintiff. Whether or not MEI is subject to the ADA or state discrimination laws presents a legal conclusion that does not require a response. Except as specifically admitted herein, MEI denies the allegations of paragraph 12.

9. MEI admits that Plaintiff began his employment with MEI on or about May of 2013. MEI is without knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 13 of the Complaint and, therefore, denies the same.

10. MEI is without knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Complaint and, therefore, denies the same.

11. MEI admits that Plaintiff periodically requested time off work to attend

personal appointments and admits that such time off was granted, but denies that Plaintiff communicated his need or the reason for his need for leave to MEI. Except as specifically admitted herein, MEI denies the allegations of paragraph 15.

12. MEI admits that Plaintiff was assigned to different job sites and work crews during his employment, but denies that such moves had anything whatsoever to do with Plaintiff's alleged receipt of any "treatment" or his taking time off for appointments. Except as specifically admitted herein, MEI denies the allegations of paragraph 16.

13. MEI admits that Plaintiff requested and was allowed time off on or about October 21, 2013, and admits that Plaintiff arrived at work late. MEI is without knowledge or information sufficient to form a belief about the truth of the allegations regarding the alleged reason for the time off as alleged in paragraph 17 of the Complaint and, therefore, denies the same. Except as specifically admitted herein, MEI denies the allegations of paragraph 17.

14. MEI is without knowledge or information sufficient to form a belief about the truth of the allegations regarding the alleged appointment, the alleged reason for the appointment or whether Plaintiff, in fact, attended such an appointment as alleged in paragraph 18 of the Complaint and, therefore, denies such allegations. Except as specifically admitted herein, MEI denies the allegations of paragraph 18.

15. Admits the allegations in paragraph 19 of the Complaint.

FIRST CLAIM FOR RELIEF

(ADA)

16. MEI incorporates its answers to paragraphs 1 through 19 of the Complaint.

17. Denies the allegations of paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of the Complaint.

SECOND CLAIM FOR RELIEF

(State Disability Discrimination)

18. MEI incorporates its answers to paragraphs 1 through 32 of the Complaint.
19. Denies the allegations in paragraphs 34, 35 and 36 of the Complaint.

MEI's AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff is barred from recovery against MEI, because Plaintiff failed to mitigate his damages, if any.
3. Plaintiff's claims are barred because (a) he was not "disabled" as that term is defined by applicable law, was not perceived as disabled and did not have a record of disability; (b) Plaintiff was not a "qualified individual" as that term is defined by applicable law, primarily because he was incapable of performing and did not perform the essential functions of his job; and (c) Plaintiff was not terminated because of any disability, but because he failed to perform the essential functions of his job in a satisfactory manner, including failing and refusing to work well with others, to cooperate and to follow instructions from superiors.
4. Plaintiff's claims are barred because he did not notify MEI of or request any reasonable accommodation for any alleged "disability."
5. Plaintiff's claims are barred by the equitable doctrine of estoppel.
6. Plaintiff's claims are barred by the equitable doctrine of unclean hands.
7. Plaintiff's claims are barred by the equitable doctrine of laches.
8. Plaintiff's claims are barred by Plaintiff's bad faith.
9. MEI reserves the right to assert additional affirmative defenses pending completion of its investigation and further discovery.

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JURY TRIAL DEMANDED

MEI requests a jury on all issues so triable.

* * * * *

WHEREFORE, having answered all allegations of Plaintiff's Complaint and asserted its affirmative defenses thereto, MEI prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice and that Plaintiff take nothing thereby;
2. That MEI be awarded its reasonable attorney fees and expenses incurred pursuant to applicable statutes and Rules, including but not limited to 42 U.S.C. § 12205, ORS 659A.885, and Fed. R. Civ. P. 11;
3. For MEI's costs and disbursements herein; and
4. For such other and further relief as the Court deems just and proper.

DATED this 15th day of December, 2014.

STEWART SOKOL & LARKIN LLC

By: s/ Tyler J. Storti

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Attorneys for Defendant Moore

Excavation Inc., d.b.a. MEI Group

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT MOORE EXCAVATION, INC.'S ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES** on:

Kerry Smith
Smith & Fjelstad
722 N. Main Ave.
Gresham, OR 97030
E-mail: kerrymls@frontier.com
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by the following indicated method or methods:

- ☒ by **E-filing** a full, true and correct copy thereof to the attorney, as shown above, at the electronic mail address reflected on the court's CM/ECF system, on the date set forth below.
- _____ by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-paid envelope, and addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.
- _____ by **e-mailing** a full, true and correct copy thereof to the party as shown above, at the last known electronic mail address reflected above, on the date set forth below.

DATED this 15TH day of December, 2014.

STEWART SOKOL & LARKIN LLC

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CERTIFICATE OF SERVICE - 1

1040.022-01137393; 1

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